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Constitutional Law - Due Process - Double Taxation

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whether conducted by individuals or corporations; but the tax is laid on the privilege of conducting business with the advantages which inhere in the corporate capacity of those taxed. *Flint v. Stone-Tracy Co.*, 220 U.S. 108, 31 Sup. Ct. 342, 55 L.Ed. 389 (1910). But corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. *Southern R. Co. v. Greene*, 216 U.S. 400, 30 Sup. Ct. 287, 54 L.Ed. 536, 17 Ann. Cas. 1247 (1909); *Kentucky Finance Corp. v. Paramount Auto Exchange*, 262 U.S. 544, 43 Sup. Ct. 636, 67 L.Ed. 1112 (1922); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 Sup. Ct. 678, 71 L.Ed. 1165 (1926).

In the majority's opinion this case fell within that class of cases which is obnoxious to the constitutional guaranty of the equal protection of the laws, since it is a clear and hostile discrimination against a particular class. It is reasonable to assume, however, that the trend is to recognize a greater liberality in the power of the legislature to tax chain stores where they are considered public evils, as evidenced by the admission in the majority opinion that a tax merely based on the number of stores is fair and reasonable.

RALPH J. PODELL.

CONSTITUTIONAL LAW—DUE PROCESS—DOUBLE TAXATION.—The deceased was a subject of Great Britain, a resident of Cuba, and at the time of his death he owned certain stocks and bonds of both domestic and foreign corporations which were on deposit in the United States. None of these securities was pledged for indebtedness, nor were they used in business here. The Board of Tax Appeals decided that the securities were not subject to the inheritance tax provided by the Revenue Act of 1924 (26 U.S.C.A., sec. 1092-96), and the decision was affirmed by the Circuit Court of Appeals, 60 F. (2) 890. *Held*, on certiorari, judgment reversed. There were two questions involved: (1) Were the securities taxable under the Revenue Act of 1924? (2) Did Congress have the power to levy such a tax in view of the "due process" clause of the Fifth Amendment of the Federal Constitution? Both questions were answered in the affirmative, but only the second will be considered in this article. *Burnet v. Brooks*, 53 Sup. Ct. 457 (1933).

The jurisdiction of a state to tax is limited by the "due process" clause of the Fourteenth Amendment of the Federal Constitution; in the case of tangible property, *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905) (property tax); *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (succession tax), and the rule has recently been extended to succession taxes of intangible property. *Farmer's Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Baldwin v. Missouri*, 281 U.S. 586 (1930); *Beidler v. South Carolina Tax Commission*, 282 U.S. 1 (1930); *First National Bank of Boston v. Maine*, 284 U.S. 312 (1932). However, it has been held that there is no similar limitation in the "due process" clause of the Fifth Amendment which would restrict or limit the jurisdiction of the Federal Government to tax, even though the wording of the "due process" clause is identical in each Amendment. *United States v. Bennett*, 232 U.S. 299 (1914) (property tax); *Cook v. Tait*, 265 U.S. 47 (1924) (tax on the income from tangible property situated in a foreign country); and in the instant case this interpretation is extended to a succession tax of intangibles.

It is not so difficult to determine which state has jurisdiction to tax tangible property, for such property often acquires a permanent situs, in which case it

is taxable only by the state in which it has so acquired a situs, *Union Refrigerator Transit Co. v. Kentucky*, supra. A more difficult question arises in the case of intangible property, for strictly speaking such property can never acquire a permanent situs, and the term "situs" is not applicable to it, *Farmer's Loan & Trust Co. v. Minnesota*, supra, unless it has become an integral part of some localized business, so as to acquire a "business situs." *New Orleans v. Stempel*, 175 U.S. 309 (1899). Where then can a succession or inheritance tax on intangible property be levied? From the recent cases it seems that only the state of the domicile of the owner may tax the transfer. *Farmer's Loan & Trust Co. v. Minnesota*, supra (municipal and state bonds); *First National Bank of Boston v. Maine*, supra (shares of stock); *Beidler v. South Carolina Tax Commission*, supra (open account); *Baldwin v. Missouri*, supra (negotiable instruments). It has been held that the state of the domicile of the cestui que trust could not tax the transfer of the trust fund from the donor to the trustee in another state, where the fund was to be kept. *Safe Deposit Co. v. Virginia*, 280 U.S. 83 (1930).

The limiting of a state's jurisdiction to tax by means of the "due process" clause of the Fourteenth Amendment is criticized as reading into the Fourteenth Amendment what is not there. Mr. Justice Holmes is a leader in the opposition and wrote strong dissenting opinions in *Farmer's Loan & Trust Co. v. Minnesota*, supra, and *Baldwin v. Missouri*, supra. The objection to the limitation seems valid, for the providing of a remedy against taxation of the same subject by more than one state is a question for the legislature rather than for the courts, and therefore the remedy should come by reciprocal legislation by the states. 30 Col. Law Rev. 405 (1930); 43 Harv. Law Rev. 792 (1930); see also 28 Col. Law Rev. 806 (1928). But the Federal Constitution is a compact between the United States to maintain peace and harmony among them; it is not a compact between the United States and foreign countries. Therefore there is a basis for holding that the jurisdiction of a state's taxing powers is limited by the Constitution, and that there is no similar Constitutional Limitation of the Federal Government's jurisdiction to tax. Taxation is one form of taking property; and therefore should be considered in view of the "due process" clause of the Fifth and Fourteenth Amendments. So it is not difficult to see that in defining the Constitutional limitation on the states' power to tax the court applied the "due process" clause of the Fourteenth Amendment. It has been held that the Federal Government may tax merely on the ground of citizenship, *Cook v. Tait*, supra; but this latter ground could not be applied in the instant case, for the deceased was not a citizen. Nor does the jurisdiction of the Federal Government to tax depend on the nature of the tax. *Cook v. Tait*, supra. The court in the instant case recognized that the evils of taxation of the same subject by more than one sovereignty should be dealt with by international treaties, and very properly finds it impossible to read a limitation out of the Fifth Amendment which would prevent double taxation, i.e., taxation of the same subject by the United States and a foreign nation.

JOHN F. SAVAGE.

CONTEMPT—JURORS PRIVILEGE—NON-APPLICATION OF PRIVILEGE.—The defendant was charged with contempt of court for giving answers which she knew to be false and misleading in response to questions affecting her qualifications as a juror. One Foshay and others were to be tried on the charge of using the mails to defraud. The defendant was summoned as one of the panel of jurors. Evidence disclosed that she was opposed to serving on the jury until informed that